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9 CARA A. BURKE,

10 Plaintiff,

No. C 04-4483 MHP

11 v.

12 PITNEY BOWES, INC. LONG-TERM
DISABILITY PLAN,
13 Defendant.

MEMORANDUM & ORDER
**Re: Cross-Motions for Partial Summary
Judgment**

14 Plaintiff Cara A. Burke filed this action under the Employee Retirement Income Security Act
15 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, seeking review of defendant Pitney Bowes, Inc. Long-Term
16 Disability Plan’s decision to terminate her disability benefits. Now before the court are the parties’
17 cross-motions for summary adjudication as to the issue of what standard of review should be applied
18 in evaluating that decision. Having considered the arguments presented and for the reasons stated
19 below, the court enters the following memorandum and order.

20 **DISTRICT COURT**

21 **BACKGROUND**

22 Prior to October 1998, plaintiff Cara A. Burke worked as a sales employee for Pitney Bowes
23 Management Services. Def.’s Exh. A at 288 (hereinafter “AR”). As a Pitney Bowes employee,
24 plaintiff qualified for coverage under the provisions of the long-term disability benefit plan (“the
25 Plan”) that defendant administers. See generally id. at 1-60. The Plan is subject to the requirements
26 of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.*

27 On June 3, 1998, plaintiff was involved in a work-related automobile accident. AR at 79. As
28 a result of her accident, plaintiff suffered back and neck injuries that caused her to miss

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1 approximately five days of work. Id. Approximately one month later, on July 7, 1998, plaintiff was
2 involved in another, non-work-related car accident. Id. This second accident aggravated her back
3 and neck injuries, and she was subsequently diagnosed with multilevel lumbar degenerative disc
4 disease, spinal stenosis, and lumbar radiculopathy. See id. at 79, 165.

5 On October 26, 1998, plaintiff went on disability leave. Id. at 79, 236. She has not returned
6 to work since that date. See id. Although she initially received workers compensation benefits
7 during her absence from the workplace, plaintiff never applied for short-term disability benefits and
8 remained on leave after her workers compensation payments ceased. See id.

9 On June 8, 2001, plaintiff applied for long-term disability benefits. See id. Her application
10 was denied by the Plan's claims review fiduciary on the ground that her injuries were work-related
11 and hence not covered by the disability insurance policy that the Plan maintained. Id. at 235. Rather
12 than appealing that determination to defendant's Employee Benefits Committee, as is required under
13 the terms of the Plan, plaintiff filed an action in this court on May 20, 2002, alleging violations of
14 sections 104(b), 502(a)(1)(B), and 502(a)(3) of ERISA, 29 U.S.C. §§ 1024(b), 1132(a)(1)(B),
15 1132(a)(3). See Roboostoff Decl., Exh. 16.¹ In September 2002, the parties entered into an
16 agreement to settle plaintiff's claims. Id., Exh. 18. Under the terms of the settlement agreement,
17 plaintiff received approximately \$43,000 as compensation for allegedly past-due disability benefits
18 and agreed to release defendant from liability for all benefits claims arising before August 1, 2002.
19 Id. at 2-3. After that date, the agreement provided that plaintiff could continue to receive benefits so
20 long as she continued to meet the Plan's definition of "Total Disability," a determination that was to
21 be "governed solely by the terms, process and procedures of the Plan and ERISA." Id. at 2.

22 Under the terms of the Plan, a participant's ability to perform the "material duties" of his or
23 her own occupation initially guides the Total Disability determination. AR at 11. However, after a
24 participant receives benefits for one year, eligibility for benefits turns on whether injury or illness
25 prevents a participant from being able "to engage in any gainful occupation or profession for which
26 he or she is, or could become, reasonably suited by education, experience, or training." Id.

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1 Plaintiff's initial twelve-month benefit period ended on August 1, 2003, thus triggering the
2 application of the "any gainful occupation" standard for establishing "Total Disability." See id.

3 In October 2003, defendant's disability department conducted a review of plaintiff's
4 continued benefits eligibility. See id. at 83. As part of that review, the department considered the
5 opinions of consulting physician Peter Griffen; plaintiff's treating physician, Ward Gypson; and the
6 opinion of an outside medical consultant, Richard Berry. Id. at 82. Relying primarily on the opinion
7 of Dr. Berry, the disability department concluded that plaintiff no longer met the Plan's definition of
8 "Total Disability." Id. Specifically, the department cited Dr. Berry's finding that plaintiff's physical
9 and neurological conditions were normal and his conclusion that her subjective symptoms were
10 "unsupported by any objective physical or neurologic findings." Id. Accordingly, the department
11 concluded that plaintiff was able to return to "light duty work" and terminated her long-term
12 disability benefits. Id.

13 After being informed of that decision in a letter dated November 3, 2003, id., plaintiff
14 appealed the disability department's determination to defendant's Employee Benefits Committee.
15 On September 27, 2004, the Committee met to review plaintiff's claim. See id. at 65. In addition to
16 considering the evidence that was presented to the disability department, the Committee reviewed
17 the result of a functional capacity evaluation that plaintiff underwent on June 28, 2004, an August
18 24, 2004 letter from Dr. Barry, and updated medical evidence that plaintiff had submitted. Id. at 67.
19 Upon completing its review, the Committee affirmed the disability department's finding that plaintiff
20 was ~~not~~ totally disabled within the meaning of the Plan. Id. at 63. In addition, the Committee
21 identified a number of other grounds for denying plaintiff's claim for benefits, including her refusal
22 to submit to an additional evaluation by Dr. Barry, as is required under the terms of the Plan, and
23 evidence that at least eighty percent of her current condition was attributable to a work-related
24 accident. Id. at 63-64.

25 Plaintiff was notified the Committee's decision in a letter dated October 12, 2004, id. at 61-
26 64, and this action followed. In her complaint, plaintiff asserts that defendant's decision to
27 discontinue her disability benefits violated ERISA and asserts claims for recovery of past-due
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1 benefits and declaratory relief. See 28 U.S.C. § 2201; 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3). Now
2 before the court are the parties' cross-motions for partial summary judgment on the question of what
3 standard of review should be applied in evaluating the adverse benefit determination at issue, with
4 plaintiff contending that the determination must be reviewed de novo and defendant asserting that
5 the more deferential abuse of discretion standard applies. The following memorandum and order
6 addresses these arguments.

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8 LEGAL STANDARD9 I. Summary Judgment

10 Summary judgment is proper when the pleadings, discovery, and affidavits show that there is
11 "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
12 of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the
13 proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material
14 fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the
15 nonmoving party. Id. The party moving for summary judgment bears the burden of identifying
16 those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine
17 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On an issue for which the
18 opposing party will have the burden of proof at trial, the moving party need only point out "that there
19 is an absence of evidence to support the nonmoving party's case." Id.

20 ~~UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA~~ Once the moving party meets its initial burden, the nonmoving party must go beyond the
21 pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a
22 genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving
23 party's allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th
24 Cir. 1994). The court may not make credibility determinations, Anderson, 477 U.S. at 249, and
25 inferences drawn from the facts must be viewed in the light most favorable to the party opposing the
26 motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991). Nonetheless, even if
27 summary adjudication of an entire claim is not warranted, Federal Rule of Civil Procedure 56(d)

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1 allows a court to grant partial summary judgment, thereby reducing the number of facts at issue in a
2 trial. Fed. R. Civ. Pro. 56(d); State Farm Fire & Cas. Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal.
3 1987) (Patel, J.).

4 II. Judicial Review of Benefits Determinations Under ERISA

5 The long-term disability plan at issue in this action is an employee benefit plan subject to the
6 requirements of ERISA. A denial of ERISA benefits is reviewed de novo unless “the benefit plan
7 gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to
8 construe the terms of the plan.” Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).
9 Under Firestone, the default presumption is that the administrator has no discretion and must show
10 that the plan confers discretionary authority. Kearney v. Standard Ins. Co., 175 F.3d 1084, 1089 (9th
11 Cir) (en banc), cert. denied, 528 U.S. 964 (1999). If the benefit plan confers discretion on the
12 administrator, a reviewing court must apply an abuse of discretion standard. Bendixen v. Standard
13 Ins. Co., 185 F.3d 939, 942 (9th Cir. 1999); McClure v. Life Ins. Co. of N. Am., 84 F.3d 1129, 1132
14 (9th Cir. 1996) (per curiam).

15 Under the abuse of discretion standard, the court’s review is limited to the administrative
16 record, and the decision of an administrator will not be disturbed unless the court determines that the
17 decision was arbitrary or capricious. McKenzie v. General Tel. Co. of Cal., 41 F.3d 1310, 1316 (9th
18 Cir. 1994), cert. denied, 514 U.S. 1066 (1995); Clark v. Washington Teamsters Welfare Trust, 8
19 F.3d 1429, 1431 (9th Cir. 1993). “The touchstone of ‘arbitrary and capricious’ conduct is
20 unreasonableness.” Clark, 8 F.3d at 1432. In contrast, under the de novo standard of review, the
21 normal summary judgment standard applies, and the district court may grant summary judgment only
22 if there are no genuine issues of material fact in dispute. Tremain v. Bell Indus., Inc., 196 F.3d 970,
23 978 (9th Cir. 1999).

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25 DISCUSSION

26 The question presented in the parties’ cross-motions for summary judgment is whether the
27 court should subject defendant’s decision to terminate plaintiff’s long-disability benefits to de novo

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1 review rather than reviewing that decision for abuse of discretion. Plaintiff cites a number of reasons
2 why de novo review is appropriate, including the absence of any provision in the Plan conferring
3 discretion upon its administrator, purported irregularities in the procedures used to evaluate her
4 claim for benefits, and the existence of a conflict of interest that influenced defendant's decision to
5 deny her claim. The court considers those arguments below.

6 I. Discretionary Language

7 The first ground that plaintiff cites as a basis for applying de novo review is the absence of
8 discretion-conferring language in the Plan. This argument can be disposed of summarily. While
9 plaintiff correctly observes that a decision to deny benefits under an ERISA-governed employee
10 benefit plan is subject to de novo review unless the plan expressly and unambiguously confers
11 discretion on the plan administrator, see Kearney, 175 F.3d at 1090, the plan at issue here expressly
12 provides that “[t]he Employee Benefits Committee shall have discretion in exercising [its] powers
13 and duties under the Plan,” AR at 33-34. These powers and duties include the authority to make
14 final determinations regarding a plan participant’s eligibility for disability benefits. Id. at 26.
15 Plaintiff’s argument that the Plan does not confer discretionary authority upon the Committee simply
16 ignores these unambiguous plan provisions and is accordingly not well-taken.

17 Arguing in the alternative, plaintiff also cites the absence of discretionary language in the
18 “Summary Plan Document” (“SPD”) that she received from defendant as a basis for applying de
19 novo review. Section 102 of ERISA, 29 U.S.C. § 1022, requires all employee benefit plan
20 administrators to furnish each plan participant with an SPD that clearly and accurately describes
21 certain information regarding the participant’s rights and obligations under the plan, including an
22 explanation of any “circumstances which may result in disqualification, ineligibility, or denial or loss
23 of benefits.” Id. § 1022(b). While plaintiff argues that such “circumstances” include a plan
24 administrator’s discretion to deny benefits, nothing in the plain language of section 102 supports
25 such a reading, and in any event, this argument is foreclosed by the Ninth Circuit’s decision in
26 Atwood v. Newmont Gold Co., 45 F.3d at 1317. In that case, the court expressly rejected an ERISA
27 plan participant’s argument that the statutory provision that plaintiff now cites required the plan

1 administrator to include the plan's discretionary language in the SPD, holding that the omission of
2 such language from the SPD "ha[d] no bearing on the events or actions [that were] determinative of
3 eligibility under the plan" and thus did not violate the requirement that the SPD disclose the
4 "circumstances which may result in . . . ineligibility" for benefits. Id. at 1321-22 (original emphasis
5 and citation omitted). This court is of course bound by the holding of Atwood, and the fact that
6 plaintiff's counsel failed to cite such adverse controlling authority raises serious questions
7 concerning his compliance with his ethical obligations as a member of the bar. That being the case,
8 for purposes of the instant motion, it is sufficient to say the absence of discretionary language in the
9 Plan's SPD does not alter the court's conclusion that the plan documents unambiguously grant
10 defendant the discretion to determine a plan participant's eligibility for disability benefits. The court
11 therefore rejects plaintiff's argument to the contrary.

12 II. Violations of Plan Procedures

13 Having concluded that the employee benefit plan at issue unambiguously grants defendant
14 the discretion to make employee benefit determinations, it remains the case that there are a number
15 of circumstances in which the administrator of an ERISA plan is deemed to have forfeited the benefit
16 of such discretionary authority. Plaintiff cites two reasons why the court should find that defendant
17 has done so here, the first of those being the procedural violations that were allegedly committed in
18 processing her disability benefits claim. The case most relevant to this first argument is Blau v. Del
19 Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985), which recognized an
20 exception to the general rule that ERISA provides no relief to an employee benefit plan participant
21 who suffers from a procedural error in the processing of his or her claim for benefits. See id. at
22 1353-54. Specifically, the court held that where a plan administrator's violations of plan procedures
23 are so egregious that they "alter the substantive relationship between employer and employee,"
24 courts should consider such violations to be "highly probative" evidence that a decision to deny a
25 benefits claim was made pursuant to an "objectionable scheme." Id. at 1354. While the court did
26 not hold that such evidence necessarily alters the standard of review, the Ninth Circuit has
27 subsequently made clear that deferential review of the administrator's decision is inappropriate under
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1 the circumstances that Blau identified. See Gatti v. Reliance Std. Life Ins. Co., 409 F.3d 1061,
2 1067-68 (9th Cir. 2005); cf. Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot.
3 Plan, 349 F.3d 1098, 1105-06 (9th Cir. 2003) (holding that de novo standard of review applies where
4 a plan administrator fails to exercise the discretion conferred upon it under the terms of an employee
5 benefit plan), cert. denied, ___ U.S. ___, ___ S. Ct. ___, 72 U.S.L.W. 3553, 73 U.S.L.W. 3059 (2005).
6 At the same time, however, the Ninth Circuit has recently confirmed that the exception that the Blau
7 court identified is a narrow one, as it applies only where the procedural violations committed by the
8 plan administrator “are so flagrant as to alter the substantive relationship between the employer and
9 employee, thereby causing the beneficiary substantive harm.” Gatti, 409 F.3d at 1068.

10 In applying this standard to the case at bar, the court begins by noting that plaintiff
11 inexplicably cites a number of alleged procedural violations that took place prior to August 1, 2002.
12 To the extent that her claims are premised upon such violations, plaintiff waived any right to pursue
13 them when she agreed to settle her pre-August 2002 benefits claims. See Roboostoff Decl., Exh. 18
14 at 3. They are thus properly disregarded in litigating the instant action, which in any event is
15 directed at obtaining relief from a decision to discontinue plaintiff’s disability that did not take place
16 until November 2003.

17 With respect to that decision, plaintiff identifies two purported procedural defects in
18 defendant’s decisionmaking process, the first being the fact that defendant’s Employee Benefits
19 Committee cited a number of grounds for discontinuing plaintiff’s benefits eligibility that the
20 disability department had not identified as bases for its initial decision to terminate plaintiff’s
21 disability benefit payments. See AR at 63-64. However, plaintiff has not cited any provision of the
22 Plan that would prohibit the Committee from considering issues that were not raised by the disability
23 department,² and even if she could do so, the disability department’s finding that plaintiff did not
24 meet the Plan’s definition of “Total Disability,” which was affirmed by the Committee, provides an
25 adequate and independent ground for terminating plaintiff’s benefits. This fact forecloses any
26 possibility that plaintiff might have suffered any substantive harm from the Committee’s willingness

1 to consider additional reasons for terminating her disability benefits, as would be required to subject
2 its conclusions to de novo review. See Gatti, 409 F.3d at 1068.

3 The only other purported procedural irregularity that plaintiff identifies is premised upon the
4 provision of the Plan requiring that review of an adverse benefit determination “shall be conducted
5 by the Employee Benefits Committee (which is neither the individual who made the adverse benefit
6 determination that is the subject of appeal nor the subordinate of such individual).” Id. at 35.

7 Relying on this provision, plaintiff argues that Connie Caperella, Pitney Bowes’ Pension and Benefit
8 Plan Investments Director, should not have participated in the Employee Benefits Committee’s
9 September 2004 decision to deny plaintiff’s appeal because she executed the agreement to settle
10 plaintiff’s pre-August 2002 benefit claims. See Roboostoff Decl., Exh. 18 at 8. However, the
11 adverse benefit determination that was at issue at the Committee’s September 2004 meeting was the
12 employment department’s November 2003 decision to discontinue plaintiff’s disability benefits,
13 which was made by Barbara Bianco, a case manager for the Plan. AR at 82. As plaintiff does not
14 suggest that Caperella participated in making that decision, nothing in the Plan barred her from
15 sitting on the committee that entertained her administrative appeal. Plaintiff’s argument to the
16 contrary is without merit. Thus, seeing that plaintiff has failed to identify any violations of plan
17 procedures that would warrant subjecting defendant’s decision to discontinue her disability benefits
18 to de novo review, the court must reject plaintiff’s attempt to overcome the plain meaning of the
19 Plan’s discretionary language on that basis.

20 III. Conflict of Interest

21 The last ground on which plaintiff seeks de novo review of the decision to terminate her
22 disability benefits is premised upon her assertion that defendant’s decision was influenced by a
23 conflict of interest. Under Ninth Circuit law, the fact that the plan administrator of an ERISA plan
24 has an economic incentive to deny an employee benefit claim will warrant applying de novo review
25 to an adverse benefit determination if the administrator’s economic interest appears to have
26 influenced its decision. Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317, 1322-23 (9th Cir. 1995);
27 see also Nord v. Black & Decker Disability Plan, 356 F.3d 1008, 1010 (9th Cir.), cert. denied,

1 U.S. __, 125 S. Ct. 62 (2004). However, a plan participant seeking to prove the existence of such a
2 conflict must provide evidence “beyond the mere fact of apparent conflict, tending to show that the
3 fiduciary’s self-interest caused a breach of the administrator’s fiduciary obligations.” Atwood, 45
4 F.3d at 1323. Here, plaintiff has cited no evidence of a conflict of interest beyond the alleged
5 procedural violations that the court addressed in the preceding discussion. Accordingly, for the
6 reasons stated above, the court is compelled to reject plaintiff’s contention that the existence of such
7 a conflict warrants reviewing defendant’s decision to terminate her disability benefits de novo.

8 IV. Summary

9 In summary, the court holds that the Plan expressly grants defendant’s Employee Benefits
10 Committee discretion to determine a plan participant’s eligibility for long-term disability benefits.
11 The court also concludes that plaintiff has failed to identify any evidence in the record that would
12 establish a procedural violation or a conflict of interest of the type that would warrant applying de
13 novo review in the case at bar. Accordingly, the court will review the decision to terminate
14 plaintiff’s disability benefits for abuse of discretion.

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16 CONCLUSION

17 For the reasons stated above, defendant’s motion for partial summary judgment is
18 GRANTED. Plaintiff’s motion for partial summary judgment is DENIED. The court will review
19 defendant’s decision to deny plaintiff’s claim for disability benefits under an abuse of discretion
20 standard.

DISTRICT COURT

21 IT IS SO ORDERED.

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23 Dated: August 8, 2005


24 MARILYN HALL PATEL
25 District Judge
26 United States District Court
27 Northern District of California
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ENDNOTES

1. The court has noted defendant's objections to the admissibility of various exhibits that Roboostoff submitted as attachments to his declaration, including Exhibit 16. However, the discussion that follows will make clear that it is unnecessary to resolve these issues at the present time. The court therefore denies defendant's evidentiary objections as moot.
 2. It should also be noted that one of the grounds that the Committee cited in denying plaintiff's appeal was the plan provision requiring that beneficiaries consent to examination by a consulting physician as a condition of receiving disability benefits. Specifically, the Committee observed that plaintiff refused to permit Dr. Barry to conduct a second examination after she appealed the disability department's decision to terminate her benefits. Given that this event occurred after that initial decision was made, see AR at 319, it is hardly surprising that the disability department did not consider it at that time.

UNITED STATES
For the Northern District of California

COURT
DISTRICT